

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

Roberts

FILE: B-209187

DATE: March 10, 1983

MATTER OF: Chamberlain Manufacturing Corporation

DIGEST:

1. A deficient IFB need not have been canceled after bid opening so that the agency could resolicit, since no competitive prejudice existed and an award meeting the Government's needs could have been made. Nonetheless, protest by the second low bidder under the canceled IFB that the IFB should be reinstated (the low bidder did not protest and will not revive its bid anyway) is denied since the protester is not entitled to the award in any event.
2. Contracting officer's failure to read aloud an alternate bid at bid opening is a matter of form rather than substance, and does not mandate that the bid be disregarded.

Chamberlain Manufacturing Corporation protests the cancellation of invitation for bids (IFB) No. DAAK10-82-B-0119 issued by the Department of the Army's Armament Research and Development Command for a quantity of XM844 practice projectiles. After bid opening, the Army rejected all bids submitted in response to the IFB and canceled the invitation based on its determination that the IFB contained a clause that overstated the amount of Government facility maintenance costs which would not be paid by the Government if a facilities contractor receiving maintenance payments used those Government facilities in the production of the required projectiles. Subsequently, the Army issued IFB No. DAAK10-82-B-0174 which was exactly the same as the canceled IFB except that the Government facility maintenance cost information was amended. Chamberlain argues that no compelling reason existed for the Army's cancellation of the initial IFB, under which Chamberlain believed it was the low responsive bidder.

Although we agree with Chamberlain that the IFB should not have been canceled, we deny the protest because the record shows that Chamberlain in fact was not the low bidder, so the firm would not be awarded a contract even if the solicitation were reinstated.

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The IFB contained a provision directed at a bidder intending to use Government facilities under a Government facilities contract in which the Government also is paying the contractor to maintain the facilities while not in production use. The IFB provided that the Government would pay no preservation, maintenance or storage costs related to the facilities from the date of award of the production contract under the IFB until 90 days after final delivery of the projectiles, a total of approximately 9 months. In other words, the IFB required that for an extended period of time, a facilities contractor with maintenance responsibilities would have its Government maintenance payments suspended.

Three firms submitted bids in response to the initial IFB. Their extended prices were:

Chamberlain	\$ 688,520
Norris Industries	\$ 728,098
National Defense Corp.	\$ 748,086
National Defense Corp. (alternate)	\$ 442,088

The Army reports that National Defense and Norris Industries have facilities contracts with the Army, and that Chamberlain operates a Government-Owned, Contractor-Operated facility. Norris and Chamberlain currently have production contracts under which their facilities are being used to manufacture projectiles. National Defense, however, having no current production contract, is the only firm with a separate maintenance agreement under which it is receiving Government payments to maintain a Government projectile facility.

National Defense bid on the basis of using Government production facilities under its Government facilities contract. Because the IFB's terms regarding the extent to which a facilities contractor would be responsible for maintenance costs during production of the projectiles conflicted with National Defense's facilities contract maintenance agreement with the Army, National Defense submitted bids to cover both situations. Its primary bid of \$748,086 included its estimate of all preservation, maintenance and storage costs for the Government facilities to be used from the date of contract award until 90 days after delivery of the projectiles. National Defense's significantly lower alternate bid of \$442,088, however, included those costs only for the period that it estimated it

actually would use the facilities during production; this was in accordance with the terms of its Government facilities contract maintenance agreement which generally suspended Government payments for maintenance-type costs only while the facility actually was in use for a production contract.

The contracting officer's determination to cancel the IFB was based on his discovery, after contacting the activity that administers National Defense's facilities contract, that the IFB provision concerning Government facilities maintenance costs did not conform to the related standard provision concerning standby maintenance in facilities contracts. As a result, he concluded, a bidder such as National Defense, intending to perform through a Government facilities contract under which it received standby maintenance payments, must have been confused as to whether to include in its bid price (a) only those maintenance-type costs chargeable to the actual production use of the facilities, in accordance with the terms of the facilities contract maintenance agreement, or (b) maintenance-type costs for a much longer period since, under the IFB's terms, it appeared that the Government would not make payments under the facilities contract maintenance agreement for that period. The Army reports that it cannot discern why the provision in issue was included in the IFB--the provision as amended in the resolicitation reflects the standard Government facilities contract arrangement, in which maintenance costs not paid to the Government facilities contractor during production efforts are determined case-by-case based only on the time of actual use of the facilities.

The Defense Acquisition Regulation (DAR) states that after bids have been opened, award must be made to the responsible bidder that submits the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. DAR § 2-404.1(a) (1976 ed.). A number of reasons considered sufficiently compelling to justify cancellation are listed in the regulations, such as where the IFB includes inadequate or ambiguous specifications. DAR § 2-404.1(b). We consistently have held that the determination of whether a sufficiently compelling reason for cancellation exists is primarily within the discretion of the contracting agency and will not be disturbed unless it was arbitrary, capricious or not supported by substantial evidence. Central Mechanical, Inc., B-206030, February 4, 1982, 82-1 CPD 91.

Chamberlain's argument basically is that National Defense should have known that it would be reimbursed maintenance-type costs for the entire period except for actual production use time, pursuant to its facilities contract. It appears, however, that Chamberlain was not aware of National Defense's low alternate bid, submitted on precisely that basis, when the protest was filed, because the contracting officer did not read the bid aloud at opening.

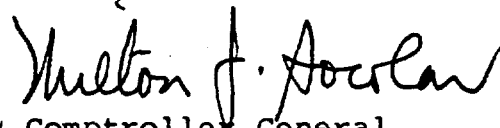
While National Defense's alternate bid should have been disclosed publicly at bid opening, 10 U.S.C. § 2305(c) (1976), the contracting officer's failure to do so is a matter of form, not of substance, and thus does not mandate that the bid be disregarded. See A. A. Beiro Construction Company, Inc., B-192664, December 20, 1978, 78-2 CPD 425. Chamberlain thus could not profit from reinstatement of the canceled IFB, since the contract then would go to National Defense based on the firm's low alternate bid.

In this regard, we believe a contract could have been awarded under the initial solicitation. The fact that there is a deficiency in an IFB is not necessarily a compelling reason to cancel and readvertise. Cancellation after bid opening is generally inappropriate where the deficiency did not cause any competitive prejudice and an award under the IFB can be made which would serve the actual needs of the Government. Tennessee Valley Services Company--Reconsideration, B-188771, September 29, 1977, 77-2 CPD 241.

National Defense's low alternate bid could be evaluated against the other bids, since it included maintenance costs only for the period of actual production use pursuant to its facilities contract maintenance agreement, which the record shows was the basis for the other bids. In this regard, Chamberlain essentially admits that it read the original IFB provision in question as clearly calling for a suspension of Government maintenance payments only during the use of the Government property in question. Furthermore, since both Chamberlain and Norris Industries were proposing to use Government facilities for this contract which were already in a production status under other Government contracts (thus making the firms responsible for maintenance of those facilities), maintenance costs, other than those directly attributable to the actual use of these facilities in the production of the required projectiles, should not have been a factor in either of their bids. Indeed, Chamberlain's bid on resolicitation was the same as its initial bid.

Therefore, the Army could have awarded a contract to National Defense based on National Defense's alternate bid under the original solicitation. It is not clear from the record why the Army did not simply take that action, rather than cancel and resolicit to state the maintenance-cost situation correctly. In any event, National Defense's low alternate bid has expired, and the firm certainly would not agree to revive it since National Defense also is the apparent low bidder under the resolicitation, at a price higher than the low alternate bid it submitted under the canceled IFB. We also note that National Defense's bid on resolicitation is lower than Chamberlain's second low original bid. Thus, the only action practicable at this time is an award to National Defense under the resolicitation.

Chamberlain's protest that the first IFB should be reinstated and award made under it to Chamberlain is denied.

for 
Comptroller General
of the United States